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Illinois Commerce Commission )  
on Its Own Motion )  
Establishing Rules for Reciprocal )  
Compensation for Internet Service )  
Provider-Bound Traffic. )

Docket No. 00-0555

**COMMENTS OF AMERITECH ILLINOIS  
REGARDING ISSUANCE OF FIRST NOTICE**

Illinois Bell Telephone Company ("Ameritech Illinois") respectfully submits its Comments on the appropriate procedure to follow in this rulemaking docket. For the reasons discussed herein, Ameritech Illinois recommends that when the Staff of the Illinois Commerce Commission ("Staff") issues its proposed rules – which it will do with benefit of prior industry collaborative sessions and competing draft proposals – the Commission treat those proposed rules as a "First Notice" under the Illinois Administrative Procedure Act ("IAPA") and publish them in the Illinois Register. ILCS 100/5-40.

**ARGUMENT**

The Commission typically promulgates and adopts administrative rules by the following, a potentially redundant, process: The Commission begins a proceeding by issuing an Order initiating a docket. Thereafter, a prehearing conference is held, which is normally followed by discovery and workshops. Following discovery and workshops, Staff may submit proposed rules and interested parties will submit written testimony and perhaps their own proposed rules or amendments. Hearings will then be held. Following the hearings, the parties may file briefs. After the filing of the briefs, possibly as much as 12 months later, the presiding Hearing

Examiner will issue a Proposed Order (“HEPO”). Parties are then given the opportunity to file Exceptions to the HEPO. The Commission will issue an Order after reviewing the HEPO and Exceptions. After the Order, the new administrative rules are published in the Illinois Register for comment (the “First Notice”). Additional hearings are permitted following a Notice and Comment period. A Second Notice is then sent to the Joint Committee on Administrative Rules (“JCAR”). Forty-five to ninety days later, JCAR will adopt or reject the Commission’s proposed rules. Attached hereto is a diagram depicting the Illinois rulemaking process described above and giving pertinent timeframes.

Although the Commission typically follows this process for adopting its rules, this lengthy process is not required by statute. The IAPA merely requires that the rulemaking process begin with Notice and Comment published in the Illinois Register. 5 ILCS 100/1-1 et seq. Because Section 5-40 of the IAPA gives the Commission the authority to hold hearings on the proposed rules after the Notice and Comment period, the entire process of having hearings prior to Notice and Comment period (everything to the left of the shaded vertical line on the diagram in Appendix A) is unnecessary and can substantially delay the effective date of the new rules for no sound reason.

Illinois courts have held that an agency may relax its processes when the circumstances dictate. As the Illinois Appellate Court stated in Cartwright v. Civil Service Commission, 400 N.E.2d 581, 584 (Ill. App. 1<sup>st</sup> Dist. 1980), “an administrative agency is not a slave to its rules. . . . [I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.” Here, of course, there is no governing rule, and the circumstances in the instant proceeding call for the Commission to depart from its typical, albeit not statutorily

required, process for adopting administrative rules. In the Commission's Order initiating this proceeding, the Commission recognized the urgency of resolving the Internet service provider ("ISP") reciprocal compensation problem. In that Order, the Commission explicitly found that there have been "dramatic shifts . . . in the utilization of the local exchange network due to the extraordinary increase in telecommunications traffic bound to Internet service providers." Order, Docket No. 00-0555 (Aug. 17, 2000). The Commission found further that these dramatic shifts have created a situation where "the current reciprocal compensation mechanism in place in Illinois (which was implemented before Internet use became widespread, with the consequent substantial increase in telecommunications traffic to ISPs) may not be appropriate for ISP-bound traffic." *Id.* Indeed, the Commission views this situation as so serious that in its May 8, 2000, Order in the Focal/Ameritech Illinois Arbitration, Docket No. 00-0027, it stated that it may need to "subject this reciprocal compensation rate [*i.e.*, the rate in the Focal/Ameritech Illinois interconnection agreement] to an adjustment, including a possible true up or retroactive payment, based on its ultimate conclusion reached in the reciprocal compensation proceeding." Plainly, this provision for a possible true up or retroactive payment was an acknowledgement of the magnitude and time-sensitivity of the problem.

It is old news that the current regime of reciprocal compensation on ISP traffic is a "boondoggle,"<sup>1</sup> that has allowed CLECs to reap as much as 4000% arbitrage profit.<sup>2</sup> As the Massachusetts Department of Telecommunications and Energy concluded nearly two years ago:

The unqualified payment of reciprocal compensation for ISP-bound traffic . . . enriches competitive local exchange carriers, Internet service providers, and

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<sup>1</sup> Communications Daily, Sept. 17, 1998, quoting, Chuck McMinn, Chairman of Covad Communications.

<sup>2</sup> Reciprocal Compensation for Internet Traffic – Gravy Train Running out of Track, Scott C. Cleland, Legg Mason Research Technology Team, June 24, 1998.

Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition. A loophole in a word. . .

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. . . ISP-bound traffic . . . generates significant reciprocal compensation payments from [ILECs] to CLECs, an imbalance which enables CLECs to increase their profits or to offer attractive rates and services to Internet service providers – or to do both. . . [T]he benefits gained, through this regulatory distortion, by CLECs, ISPs, and their customers do not make society as a whole better off, because they come artificially at the expense of others.<sup>3</sup>

Indeed, like the Massachusetts agency, this Commission recognized the unfairness of the current reciprocal compensation structure in its initiating Order. Therein, the Commission stated: “[s]ince current reciprocal compensation rates are based on traditional voice calls that, on average, exhibit shorter holding times, it may be inappropriate to apply these rates to local ISP-bound traffic. . . . To exacerbate this problem, the flat-rated local revenue received by the local exchange provider may be insufficient to recover the per-minute of use cost associated with reciprocal compensation payments. Order, Docket 00-0555 (Aug. 17, 2000) (Emphasis in original). And every day that the this docket is prolonged is another day on the undeserved gravy train for the CLECs.

For these reasons, Ameritech Illinois believes that it is in the interest of justice that the Commission allow this proceeding to advance expeditiously by using Staff’s proposed rules for the purposes of publishing in the Illinois Register for Notice and Comment. Doing so would save significant time in the resolution of this serious problem. Moreover, although it cannot currently be known what will be the context of the rules that Staff will ultimately propose, Staff

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<sup>3</sup> DTE 97-116-C, Complaint of MCI WorldCom, Inc. against New England Telephone Company d/b/a Cell Atlantic – Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996, Order (May 19, 1999) at \*15-\*17 (1999 WL 634357 (Mass.D.T.E.)).

is likely to develop proposed rules appropriate for use as First Notice. In any event, no matter what their actual form, Staff's proposed rules will certainly serve as a point to engender discussion and comment. Nothing more is required under the IAPA.

No party will be prejudiced by moving the process along in such a statutorily acceptable expedient manner. The Notice and Comment procedures of a rulemaking proceeding are designed to give "adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses."<sup>4</sup> These procedures are designed to create a "framework for principled decision-making."<sup>5</sup> Illinois courts have made it clear that due process under the IAPA requires nothing more than notice, a hearing before an impartial tribunal, representation by counsel, the opportunity to cross-examine witnesses and the to present evidence, and the opportunity to inspect documentary evidence. See Ladenheim v. Union County Hospital District, 394 N.E.2d 770 (Ill. App. Ct. 1979); see also Cox v. Daley, 417 N.E.2d 745 (Ill. App. Ct. 1981); Goranson v. Dep't of Registration and Education, 415 N.E.2d 1249 (Ill App. Ct. 1980). By streamlining the process to allow Staff's proposed rules to be used for the purposes of a First Notice, no party will be deprived of any of the measures due process requires. Consequently, under the current circumstances, where the Commission has noted that a significant problem exists, and where further delays will only exacerbate the problem, it is in the interest of justice to use Staff's proposed rules for the purpose of First Notice in this proceeding.

And finally, as a practical matter, the ISP reciprocal compensation issue is significant, but it also has been around for some time, workshops have been conducted on the rules to be proposed, and the battle lines are very clearly drawn. In these circumstances, requiring the

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<sup>4</sup> ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77<sup>th</sup> Cong., 1<sup>st</sup> Sess. 251.

<sup>5</sup> International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973).

parties to litigate the issue two more times – once under typical Commission procedures and again through the IAPA process – would be unnecessarily wasteful and inefficient. Indeed, the Commission should cut to the chase.

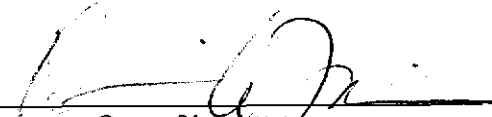
### CONCLUSION

For the foregoing reasons, Ameritech Illinois respectfully requests that the Commission use the proposed rules Staff will be submitting in this proceeding 2001, for the purposes of publishing a First Notice in the Illinois Register.

Respectfully submitted,

AMERITECH ILLINOIS

By:

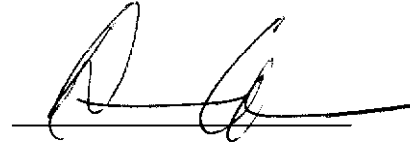
  
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## **CERTIFICATE OF SERVICE**

I, Dennis G. Friedman, an attorney, hereby certify that I caused copies of Ameritech Illinois' Comments Regarding Issuance of First Notice to be served on the parties on the attached service list by U.S. mail, with all charges paid, this 11<sup>th</sup> day of April, 2001.

A handwritten signature in black ink, appearing to read "D. G. Friedman", is written over a horizontal line.

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